

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2708

Cir. Ct. Nos. 2012TR5662
2012TR5846

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

V.

IAN A. NIQUETTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

¶1 REILLY, J.¹ Ian A. Niquette appeals the denial of his motion to suppress evidence and his conviction for drunk driving. Niquette was arrested

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

after he struck a parked car at 5:50 in the morning with such force that it overturned his pickup truck. The Fond du Lac County sheriff's deputy who arrived on the scene of the accident found Niquette sitting on the curb near his vehicle. Niquette admitted to the deputy that he was the driver. The deputy observed Niquette to have "red, glossy eyes" and smell of intoxicants. Niquette told the deputy that he had been drinking. The deputy had Niquette perform field sobriety tests and then submit to a preliminary breath test (PBT), which revealed an alcohol content above the legal limit for operating a vehicle. Niquette was thereafter arrested and a blood draw was taken, which revealed a blood alcohol content of .149.

¶2 Niquette argues that the deputy did not have probable cause to ask him to submit to a PBT because he had just performed well on the walk-and-turn and one-leg-stand portions of his field sobriety tests.² Without the PBT, Niquette suggests, the deputy would not have probable cause for an arrest and would not have obtained the results of a blood test that showed he was driving drunk. The trial court refused to suppress the PBT or blood-test results and found Niquette guilty of drunk driving after a trial. We agree with the trial court in all respects.

¶3 WISCONSIN STAT. § 343.303 provides that a law enforcement officer may administer a PBT, and subsequently rely on the results in court to establish probable cause for arrest, if the officer "has probable cause to believe" that a person has been driving drunk. In evaluating whether an officer has "probable

² Niquette exhibited six of six clues of intoxication on the horizontal gaze nystagmus test. Niquette challenges whether the County was able to establish the significance of those results at his court trial. As we find there was probable cause to believe Niquette was intoxicated absent the field sobriety tests, we need not address this issue. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

cause to believe” a person has been driving drunk, we uphold the trial court’s findings of fact unless clearly erroneous, but review de novo whether those facts satisfy the statutory standard. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶4 “[P]robable cause is a determination made ‘looking at the totality of the circumstances’ and is a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” *State v. Goss*, 2011 WI 104, ¶25, 338 Wis. 2d 72, 806 N.W.2d 918. The amount of proof necessary for a law enforcement officer to request a PBT is greater than the reasonable suspicion necessary for an investigatory stop but less than the probable cause needed for an arrest. *Id.*

¶5 Niquette argues that although the deputy may have had reasonable suspicion to investigate whether he was driving drunk by administering field sobriety tests, once he performed well on those tests, the deputy did not have the probable cause necessary to believe that he was intoxicated so as to administer the PBT. We disagree. Niquette crashed his truck into the back of a parked vehicle in a twenty-five-mile-per-hour speed zone with enough force to flip his vehicle onto its side. Niquette reeked of alcohol and admitted that he had been drinking and driving. Common sense dictates that not only did the deputy have more than reasonable suspicion to investigate but she had probable cause to believe Niquette had been driving drunk so as to request Niquette to submit to a PBT.

¶6 Our case law is clear on Niquette’s argument. We rejected a similar argument in *State v. Felton*, 2012 WI App 114, 344 Wis. 2d 483, 824 N.W.2d 871, *rev. denied*, 2013 WI 22, ___ Wis. 2d ___, 827 N.W.2d 374. In language equally applicable to Niquette, we stated:

That Felton successfully completed all of the properly administered field-sobriety tests does not, as Felton argues, subtract from the common-sense view that Felton may have had a blood-alcohol level that violated WIS. STAT. § 346.63(1), any more than innocent behavior automatically negates either probable cause or even the lower reasonable-suspicion standard. Indeed, [the law enforcement officer] would have been fully justified in asking Felton to take a preliminary-breath test without even asking him to perform any field-sobriety tests because they are not needed to establish probable cause to arrest someone for drunk driving and, as we have seen, the probable-cause standard is lower for assessing the validity of giving a preliminary-breath test than it is for an arrest.

Felton, 344 Wis. 2d 483, ¶10 (citations omitted). The circumstances in *Felton* were less egregious than those present before us. *See id.*, ¶9.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

